

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISIONS

UNITED STATES OF AMERICA,) NO. CV08-05720 DSF (MANx)
Plaintiff,)
v.)
THE BOEING COMPANY,)
Defendant.)
)

) STIPULATED ORDER GOVERNING USE
OF PROTECTED INFORMATION AND
NON-WAIVER OF PRIVILEGE

Based on the parties' Stipulation For Entry of Stipulated Order Governing Use Of Protected Information And Non-Waiver Of Privilege ("Stipulated Protective Order"), filed on June 22, 2010, the terms of the Stipulated Protective Order are adopted as an order of this Court, except to the extent, as set forth below, that those terms have been modified by the Court's amendment of paragraph 13 of the proposed Stipulated Protective Order.

The parties are expressly cautioned that the designation of any information, document, or thing as Protected Information does

1 not, in and of itself, create any entitlement to file such
2 information, document, or thing, in whole or in part, under seal.
3 Accordingly, reference to this Stipulated Protective Order or to
4 the parties' designation of any information, document, or thing as
5 Protected Information is wholly insufficient to warrant a filing
6 under seal.
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8 There is a strong presumption that the public has a right of
9 access to judicial proceedings and records in civil cases. In
10 connection with non-dispositive motions, good cause must be shown
11 to support a filing under seal. The parties' mere designation of
12 any information, document, or thing as Protected Information does
13 not - without the submission of competent evidence, in the form of
14 a declaration or declarations, establishing that the material
15 sought to be filed under seal qualifies as confidential,
16 privileged, or otherwise protectible - constitute good cause.
17 Further, if sealing is requested in connection with a dispositive
18 motion or trial, then compelling reasons, as opposed to good cause,
19 for the sealing must be shown, and the relief sought shall be
20 narrowly tailored to serve the specific interest to be protected.
21 See *Pintos v. Pacific Creditors Ass'n*, 605 F.3d 665, 677-79 (9th
22 Cir. 2010). For each type of information, document, or thing
23 sought to be filed under seal in connection with a dispositive
24 motion or trial, the party seeking protection must articulate
25 compelling reasons, supported by specific facts and legal
26 justification, for the requested sealing order. Again, competent
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1 evidence supporting the application to file documents under seal
2 must be provided by declaration.

3 Any document that is not confidential, privileged, or
4 otherwise protectible in its entirety will not be filed under seal
5 if the confidential portions can be redacted. If documents can be
6 redacted, then a redacted version for public viewing, omitting only
7 the confidential, privileged, or otherwise protectible portions of
8 the document, shall be filed. Any application that seeks to file
9 documents under seal in their entirety should include an
10 explanation of why redaction is not feasible.
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12 **I. PURPOSE OF ORDER GOVERNING THE USE OF PROTECTED INFORMATION**

13 1. The discovery to be conducted in this case has required
14 the parties, plaintiff United States of America (the "United
15 States") and defendant The Boeing Company ("Boeing"), to disclose
16 Protected Information (as defined herein). The United States and
17 Boeing are referred to collectively herein as the "Parties" and
18 individually as a "Party."

19 2. This Stipulated Order governs the use of Protected
20 Information during all discovery and pre-trial proceedings in this
21 case.

22 3. The terms "Document" and "Documents" as used herein shall
23 have the broadest possible meaning pursuant to Federal Rule of
24 Civil Procedure 34(a), including electronically stored information.
25 The term "Document" shall include, without limitation, written or
26 printed matter of any kind, including originals, conforming copies,
27 and non-conforming copies (e.g., a copy of an original with an
28 added notation). The terms "Document" and "Documents" shall also

1 include, without limitation, correspondence, letters, reports,
2 summaries, spreadsheets, invoices, memoranda, notes, messages,
3 communications, telexes, cables, telecopies, telegrams, facsimiles,
4 e-mails, microfilm, compact disks (CDs), digital versatile disks
5 (DVDs), photographs, charts, graphs, maps, drawings, prints, and
6 films and all manner of electronic data processing storage.

7 **II. DESIGNATION OF PROTECTED INFORMATION**

8 4. Whenever counsel for either Party believes that Documents
9 that have been produced in this action by a Party or a non-party,
10 formally or informally, deposition transcripts, responses to
11 interrogatories, or responses to requests for admission
12 (hereinafter, collectively, "Materials") contain or may contain (1)
13 trade secrets or other confidential research, development, or
14 commercial information within the meaning of Rule 26(c)(1)(G) of
15 the Federal Rules of Civil Procedure, and/or (2) "Technical data,"
16 as defined in 22 C.F.R. § 120.10 (hereinafter, collectively,
17 "Protected Information"), he or she may designate such Material as
18 containing Protected Information by affixing on the Material the
19 legend "Protected Information". The designation shall be affixed
20 to each and every page of the Material. For Material produced in a
21 non-paper medium (e.g., videotape, audio tape, computer disks,
22 etc.) where the Documents stored on the medium have not been marked
23 with the legend, the legend shall be affixed to the outside of the
24 medium or its container.

25 5. If a Party producing Documents elects to produce them for
26 inspection rather than producing copies, the designation of
27 Protected Information need not be made in advance of the initial
28 inspection by the Party to which the Documents are being produced;

1 the designation instead may be made at or prior to the time that
2 the Documents designated for copying are produced.

3 6. All Materials labeled as Protected Information prior to
4 or after the entry of this Stipulated Order shall be considered as
5 designated under and subject to the terms of this Stipulated Order.

6 7. All persons receiving copies of Materials designated as
7 Protected Information shall maintain such Protected Information in
8 his or her possession in a manner sufficient to protect such
9 Materials against unauthorized disclosure. The Parties shall
10 advise all witnesses, consultants and experts who are provided with
11 Material designated as Protected Information after the date of this
12 Stipulated Order of the existence of the Stipulated Order and the
13 provisions of this Paragraph and Paragraph 11.

14 8. Nothing herein shall be construed to preclude either
15 Party from asserting the attorney-client privilege, the work
16 product doctrine, the deliberative process privilege, the law
17 enforcement investigatory privilege, or any other applicable
18 privilege or protection, or from declining to produce Materials, or
19 portions thereof, where the Party deems appropriate. Except as
20 provided in Paragraph 24, below, nothing herein shall be construed
21 to preclude either Party from challenging assertions of privilege
22 or other protections from disclosure in Court pursuant to the
23 Federal Rules of Civil Procedure or any other governing authority.

24 9. This Stipulated Order is not intended to compromise the
25 rights of any Party to object to discovery pursuant to the Federal
26 Rules of Civil Procedure or any other governing authority, nor is
27 it intended to alter any burden of proof regarding any assertion of
28 privilege or other protection from disclosure in this matter.

10. Nothing in this Stipulated Order relieves any Party from complying with all applicable statutes, regulations, and executive orders, including without limitation, the Arms Control Act, Title 22 U.S.C. § 2751 et seq., and/or regulations promulgated thereunder, including the International Traffic in Arms Regulation ("ITAR") and the Export Administration Regulation ("EAR").

**III. USE OF DOCUMENTS AND OTHER MATERIALS DESIGNATED AS
PROTECTED INFORMATION**

11. Materials that have been designated as containing Protected Information in accordance with the terms of this Stipulated Order, copies of such Materials, and notes that summarize or discuss such Materials shall be used solely for the purpose of conducting this case and not for any business or other purpose whatsoever by any person having access to such Materials, except as expressly provided herein.

12. Except as expressly provided herein, Materials designated as containing Protected Information shall be disclosed only to the Parties, current and former employees of the Parties, attorneys for the Parties and persons employed in such attorneys' offices, or other persons as reasonably necessary for the preparation or trial of this action, including third-party witnesses, independent experts and consultants retained for this litigation, vendors providing litigation support services, the Court and its administrative and clerical staff, mediators or other neutrals appointed by the Court or agreed to by the Parties, court reporters and court videographers designated to record depositions and other proceedings in this action, and interpreters or translators.

1 13. If a Party wishes to file or lodge with the Court any
2 Material that it believes contains Protected Information, the Party
3 shall if practicable redact the Protected Information before filing
4 or lodging the Material. If the Party believes that it is not
5 practicable to redact the Protected Information, or the redacted
6 information is material to the resolution of the matter presented
7 to the Court, the Party may apply to the Court pursuant to Local
8 Rule 79-5 and Paragraph 6 of the Court's Standing Order for an
9 order permitting the unredacted Material to be filed or lodged
10 under seal. The provisions of Paragraph 14.e-f, below, shall apply
11 to such applications.

12 14. If a Party (the "filing Party") (a) wishes to file or
13 lodge any Material with the Court, (b) is aware that the Material
14 has been designated as Protected Information by the other Party
15 (the "designating Party"), and (c) does not agree that the Material
16 in fact contains Protected Information, the filing Party shall
17 follow the procedures described in Paragraph 14.a-g below.

18 a. The filing Party shall give the
19 designating Party notice by email of intent to file
20 or lodge the Material, identifying it by Bates number
21 or page and line citation as applicable, at least
22 five (5) business days prior to filing or lodging the
23 Material, if practicable. If five (5) business days'
24 notice is not practicable, the filing Party shall
25 give the designating Party notice of its intent to
26 file or lodge the Material at the earliest time
27 practicable, but in no event shall notice be given
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1 later than 5:00 p.m. the last business day prior to
2 the date of filing or lodging.

3 b. The Parties shall meet and confer in
4 person or by telephone or e-mail within three
5 business days after such notice is given to discuss
6 with each other whether or not the Material should be
7 filed/lodged under seal, and/or whether portions of
8 the Material should be redacted before the Material
9 is filed or lodged. If the Parties agree that some
10 or all of the Material should be filed/lodged under
11 seal, the Parties shall jointly apply to the Court
12 pursuant to Local Rule 79-5 and Paragraph 6 of the
13 Court's Standing Order for an order permitting the
14 Material to be filed or lodged under seal.

15 c. If the Parties are unable to reach
16 agreement regarding whether some or all of the
17 Material should be filed under seal, the Material
18 shall be provisionally filed or lodged under seal, in
19 an envelope with a cover page indicating that the
20 Material is being provisionally filed or lodged under
21 seal pursuant to this Stipulated Order. The Clerk of
22 the Court is hereby directed to accept for filing
23 and/or lodging such sealed envelopes and the Material
24 they contain. By filing Material under provisional
25 seal in compliance with this Stipulated Order, the
26 filing Party does not thereby take any position
27 regarding whether or not the Material ultimately

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1 should be sealed, and may oppose the application to
2 seal as provided for herein.

3 d. The designating Party shall have five (5)
4 business days after the filing or lodging of the
5 provisionally-sealed Material to file and serve an
6 application to seal the Material, with a memorandum
7 of law and any supporting declarations demonstrating
8 good cause to seal the Material. Any opposition to
9 the application must be filed within five (5)
10 business days of the date the application is filed.
11 No reply papers will be permitted without prior leave
12 of Court.

13 e. In the event the Court denies the
14 application to seal the Material, (1) the filing
15 Party shall have three (3) business days from the
16 date it receives notice of such denial to file/lodge
17 an unsealed version of the Material; (2) an unsealed
18 version of the Material shall be deemed to be timely
19 filed/lodged (i.e., filed/lodged as of the date it
20 was provisionally filed/lodged under seal) in the
21 event it is filed/lodged within three (3) business
22 days from the date that Party receives notice that
23 the Court has denied the request to seal the
24 Material; (3) the filing Party shall include with the
25 Material a caption page titled "Unsealed Material
26 Filed Pursuant to Court Order," and (4) the Clerk of
27 the Court shall accept such Material for filing
28 and/or lodging.

1 f. In the event the application to seal the
2 Material is granted, the Material shall remain sealed
3 in accordance with the Court's order.

4 15. Paragraphs 7, 12, 13, 14, and 16 of this Stipulated Order
5 shall not apply to Materials marked or introduced into evidence at
6 trial of this action, or to Materials used in connection with any
7 appeal in this action.

8 16. Except as provided in Paragraphs 17 and 18, below, if any
9 Party or other person authorized under this Stipulated Order to
10 receive Protected Information receives a subpoena or other request
11 for production or other disclosure of Material, and is aware that
12 the Material has been designated by a Party as containing Protected
13 Information, the Party or person receiving the subpoena or request
14 shall give written notice to counsel for the Party or Parties that
15 designated the Material as Protected Information, identifying the
16 information requested and enclosing a copy of the subpoena or any
17 written request. Such notice shall be given as soon as practicable
18 after receipt of the subpoena or request. If any Party that
19 designated the Material as Protected Information objects to
20 disclosure, that Party shall communicate its objection in writing
21 to the person who propounded the subpoena or request in accordance
22 with Federal Rule of Civil Procedure 45(c)(2)(B), or other
23 applicable federal and/or State laws, or upon such other schedule
24 and in such manner as agreed to in writing by the objecting Party
25 and the party that issued the subpoena or request. Except as
26 provided in Paragraphs 17 and 18 below, if a motion is filed
27 pursuant to Federal Rule of Civil Procedure 45, or other applicable
28 federal and/or State laws, the Party or person who received the

1 subpoena or request shall not disclose the Material designated as
2 containing Protected Information until the matter is decided by a
3 court or other competent body (e.g., the U.S. Department of State,
4 Directorate of Defense Trade Controls, in the case of "Technical
5 data," as defined in 22 C.F.R. § 120.10).

6 17. Nothing contained in this Stipulated Order shall prevent
7 or in any way limit or impair the right of the United States to
8 disclose to any agency, department, or other component of the
9 United States, any Material designated as containing Protected
10 Information that may reflect or pertain to any potential violation
11 of law or regulation, or any matter within the jurisdiction of that
12 agency, department, or component; nor shall anything contained in
13 this Stipulated Order prevent or in any way limit or impair the
14 right of any agency, department, or component of the United States
15 to use any Protected Information in any proceeding relating to any
16 potential violation of law or regulation, or to any matter within
17 the jurisdiction of that agency, department, or component;
18 provided, however, that the United States shall notify the agency,
19 department, or component of the provisions of this Stipulated Order
20 and that the Protected Information has been produced pursuant to
21 this Stipulated Order so that the agency, department, or component
22 can make reasonable efforts to maintain the confidentiality of the
23 Protected Information consistent with the terms of this Stipulated
24 Order.

25 18. Nothing contained in this Stipulated Order shall prevent
26 or in any way limit or impair the right of the United States to
27 provide any Material designated as containing Protected Information
28 to Congress pursuant to a Congressional request; provided, however,

1 that the United States shall notify the Congressional entity
2 requesting the Material of the provisions of this Stipulated Order
3 and that the Material has been designated as containing Protected
4 Information pursuant to this Stipulated Order. If there are no
5 objections interposed by the Congressional entity requesting the
6 Material, the United States shall use reasonable efforts to notify
7 Boeing of the Congressional entity's request and the United States'
8 response thereto.

9 19. Nothing in this Stipulated Order shall be deemed to
10 preclude the Parties or third parties, on an appropriate showing,
11 from seeking and obtaining from the Court additional protection
12 with respect to the confidentiality of Materials, or from seeking
13 and obtaining from the Court leave to make disclosures of Materials
14 beyond the disclosures permitted by this Stipulated Order.

15 20. By entering into this Stipulation neither Party thereby
16 agrees that Materials designated by the other Party as Protected
17 Information merit sealing or other special protection, or that the
18 other Party's use of the Protected Information designation on any
19 or all Materials is well founded.

20 **IV. NON-WAIVER OF PRIVILEGE**

21 21. While each of the Parties has undertaken reasonable
22 efforts to identify and withhold from production any Document (or
23 portion thereof) that it believes is privileged or otherwise
24 protected from disclosure, there is a possibility that certain
25 privileged or otherwise protected material may be produced in this
26 action inadvertently.

27 22. Any inadvertent disclosure of Documents protected by the
28 attorney-client privilege, the work product doctrine, the

1 deliberative process privilege, the investigative files privilege,
2 or any similar privilege or protection, shall not constitute a
3 waiver of the privilege or protection by the Party that disclosed
4 the Documents (the "disclosing Party"), nor result in a subject
5 matter waiver of any kind, provided the following procedure is
6 followed. Within five (5) business days after the disclosing Party
7 discovers that it has inadvertently produced a Document that is
8 privileged or otherwise protected from disclosure, it shall notify
9 the other Party (the "receiving Party") in writing. Upon receipt
10 of such notice, the receiving Party must (a) promptly return the
11 specified Document and any paper or electronic copies thereof, or
12 (b) promptly make reasonable efforts to destroy or delete the
13 Document and all paper and electronic copies thereof, and promptly
14 send written confirmation of the destruction and/or deletion to the
15 disclosing Party.

16 23. In the event that a receiving Party discovers that it has
17 received from the disclosing Party a Document that appears to be
18 privileged or otherwise protected from disclosure, the receiving
19 Party shall promptly notify the disclosing Party of that fact in
20 writing.

21 24. Subject to the disclosing Party's submission of a timely
22 written notice of inadvertent production in accordance with
23 Paragraph 22, the receiving Party, by entering into this Stipulated
24 Order, waives the right to challenge the disclosing Party's claim
25 of privilege or other protection from disclosure on the ground that
26 the disclosing Party waived the privilege or protection by
27 inadvertent disclosure. By entering into this Stipulated Order,
28 however, the receiving Party does not thereby waive the right to

1 challenge the assertion of privilege or other protection from
2 disclosure on any other ground.

3 **V. CONCLUSION OF LITIGATION**

4 25. Within ninety (90) days after the conclusion of this
5 litigation, each Party shall undertake reasonable and prudent
6 efforts to return to the other Party, or destroy, all Material that
7 the other Party designated as containing Protected Information,
8 except that each Party may maintain one copy of any Material
9 designated as containing Protected Information in its file for this
10 case.

11 26. Upon final termination of this action, whether by final
12 judgment after all appeals, settlement, dismissal, or other
13 disposition, the provisions of this Stipulated Order shall continue
14 to be binding upon all persons or entities who are subject to the
15 terms hereof, and the Court shall retain jurisdiction for
16 enforcement of this Stipulated Order.

17 **IT IS SO ORDERED.**

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19 Dated: August 13, 2010

Margaret A. Nagle

20 MARGARET A. NAGLE
21 UNITED STATES MAGISTRATE JUDGE
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